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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re V. et al., Persons Coming Under the Juvenile Court Law.	B207993 (Los Angeles County Super. Ct. Nos. CK71611 & CK71612)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARIA F. et al., Defendants and Appellants.	

APPEAL from the judgments of the Superior Court of Los Angeles County, Stephen Marpet, Juvenile Court Referee. Affirmed in part and reversed in part.

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Defendant and Appellant Maria F.

John Cahill, under appointment by the Court of Appeal, for Defendant and Appellant Carlos Q.

Anna L. Ollinger, under appointment by the Court of Appeal, for Minor T.

Raymond G. fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel and Denise M. Hippach, Associate County Counsel, for Plaintiff and Respondent.

The minors in this appeal are T. and V., unrelated 12-year-old girls who lived in the home of Carlos, who is T.'s father, and Maria, who is V.'s mother. Separate dependency petitions were filed as to each girl.[1]

Carlos and T. appeal from the judgment of May 7, 2008, declaring T. a dependent of the court under Welfare and Institutions Code section 300.[2] Carlos and T. contend substantial evidence does not support the findings and orders. We hold substantial evidence supports the findings and orders in T.'s case, and affirm.

Maria appeals from the judgment of May 23, 2008, declaring V. a dependent of the court. Maria contends the dependency court lacked authority to reverse its prior order dismissing the petition with prejudice, and substantial evidence does not support the findings and orders. We hold the order dismissing the petition was a final, appealable judgment, and the court had no authority to reinstate the petition. Accordingly, we reverse the judgment on Maria's appeal.

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1 T.'s mother and V.'s father are not parties to this appeal.

2 All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

STATEMENT OF FACTS AND PROCEDURE

T. and V. were detained in February 2008 by the Department of Children and Family Services when V. disclosed to friends at school that Carlos had been touching her breasts and buttocks. Section 300 petitions were filed[3] which alleged, inter alia, that T. and V. were at risk of physical harm under section 300, subdivisions (b), and at risk of sexual harm under subdivision (d), in that Carlos sexually abused V. by fondling her breasts and buttocks. V.'s petition also alleged that Maria knew of the sexual molestation but failed to protect her.

Carlos supervised the girls on weekday evenings while Maria worked until 10:00 p.m. V. told the police that for at least the past year Carlos had been touching her chest and "butt" in ways that made her uncomfortable, and his conduct was escalating. He touched her chest when he hugged her and squeezed her butt. He tried to look at her or touch her when she was in bed. Two weeks earlier, he squeezed her breast. V. told the social workers Carlos had been sexually abusing her for a long time and his actions were becoming more frequent and aggressive. He touched and grabbed her breasts and buttocks and tried to touch her vagina while her clothes were on. He touched her vagina, breasts, and buttocks with her clothes on when she was in bed. V. told the medical personnel who conducted a child sexual abuse examination that Carlos tried to touch her under her clothes but she pushed him away.

T. stated that V. had told her that Carlos had licked V.'s ear. On one occasion, T. and V. observed Carlos watching a pornographic movie in the living room when T. and V. were in their bedroom.

Carlos denied ever touching V. inappropriately. He admitted having given V. a "wet willy," which consists of placing saliva on his index finger and placing the finger in V.'s ear, after V. did that to him. Carlos enrolled in counseling. The counseling agency

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[3] V.'s and T.'s dependency petitions were filed in separate dockets but heard together as companion cases.

reported he was "in the beginning phase of treatment." Maria did not believe Carlos sexually molested V. and intended to remain in a relationship with him.

Testimony on the petitions was heard by the dependency court referee on May 7, 2008. V. testified that one or two years earlier, Carlos started touching her on her "butt," including slapping it. For example, on one occasion, Carlos passed by as she was opening the refrigerator, reached out and slapped her butt. His contact made her feel very uncomfortable. On another occasion, he squeezed her breasts in the living room. He also touched her breasts and her butt with his hands when he hugged her. V. never told him not to touch her because "it was scary for me to say no." He touched her in a way that made her feel uncomfortable almost every day. Two weeks before she was detained, Carlos came into the bedroom where V. was picking up laundry. He not only touched her butt and breasts, but he also pulled down her pajama pants and put his finger in her vagina. V. described this incident reluctantly and tearfully. Carlos licked inside her ear with his tongue. He did not give her a "wet willie."

The dependency court found V.'s testimony "extremely credible" and sustained the allegations of T.'s petition. T. was declared a dependent of the court, custody was taken from the parents, and reunification services were ordered for Carlos. The court ordered Carlos to have monitored visits with T. and granted the Department discretion to liberalize the visits.

The dependency court further found that the evidence was insufficient to support the allegation that Maria failed to protect V. with knowledge of the molestations. Believing there was no basis for jurisdiction in V.'s case without a sustained allegation that Maria failed to protect, the court dismissed V.'s petition with prejudice.

T. and Carlos filed timely appeals of the May 7, 2008 judgment and orders.

On May 14, 2008, the dependency court referee sua sponte put V.'s case on calendar, after concluding it had erred as a matter of law in dismissing V.'s petition. The referee determined that V. was within the court's jurisdiction under section 300, subdivision (d), because she was abused by a member of her household, and there was no requirement that mother failed to protect. Stating he intended to sustain the section 300,

subdivision (d) allegation that Carlos sexually abused V. and strike the failure-to-protect allegations concerning Maria, the referee vacated the order dismissing the petition in V.'s case and reset the matter for adjudication.

The hearing on the proposed change of order took place on May 23, 2008. Maria objected to "reinstatement of jurisdiction." Without altering its factual findings, the dependency court referee amended V.'s petition to delete references to Maria and sustained the amended section 300, subdivision (d) allegation. V. was declared a dependent of the court and placed in Maria's home. Maria was ordered to participate in counseling and enroll V. in counseling. Maria timely appealed the judgment and orders of May 23, 2008.

The appeals by T., Carlos, and Maria were consolidated for purposes of briefing, oral argument, and decision. (*In re V.G. et al.*, B207993, B208474, order filed Aug. 28, 2008.)

DISCUSSION

I. T.'s Petition: Substantial Evidence Supports the Findings

Carlos and T. contend substantial evidence does not support the finding Carlos sexually molested V. or the order removing T. from Carlos's custody. We disagree with the contentions.

"In reviewing the jurisdictional findings and the disposition, we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court. [Citation.]" (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) "We do not reweigh the evidence or exercise independent

judgment, but merely determine if there are sufficient facts to support the findings of the trial court." (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.)

A. The Findings on T.'s Petition

V.'s testimony and statements to the police and social workers that Carlos touched and squeezed her breasts and buttocks are substantial evidence supporting the sustained allegation that Carlos fondled her breasts and buttocks. T.'s argument that V.'s statements contained fatal inconsistencies is merely a request that we reweigh the evidence, which we will not do. (*In re Matthew S.*, *supra*, 201 Cal.App.4th at p. 321.)

B. The Findings on the Removal Order

Section 361, subdivision (c) provides in pertinent part: "A dependent child may not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), inclusive . . . : [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody. . . . The court shall consider, as a reasonable means to protect the minor, the option of removing an offending parent or guardian from the home."

Carlos's denial that he sexually molested V. and the fact he was only in the early stage of treatment, provides substantial evidence that T. was at risk of sexual abuse. The evidence that Maria did not believe any sexual abuse had taken place, and Carlos supervised T. in the evenings, supported the finding that there were no reasonable means to keep T. safe in Carlos's custody in the family home even under conditions imposed by the dependency court. The removal order is supported by substantial evidence.

To the extent T. contends the dependency court failed to "state the facts on which the decision to remove the minor is based," as required by section 361, subdivision (d), it is not reasonably likely that a statement of the court's factual findings would have favored Carlos's continued custody. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218-1219.) Carlos and T. argued to the court that custody should not be taken from Carlos or that T. should be allowed to remain in Carlos's custody under orders that Carlos continue in counseling. The court rejected these arguments. The court found V., who testified to a pattern of sexual abuse that had escalated to fondling her vagina, highly credible. Accordingly, we conclude there is no reasonable probability the result would have been different had the court stated its reasons for removal on the record.

II. V.'s Petition

A. The Dependency Court Had No Authority to Change the Order Dismissing the Petition

Maria contends the dependency court lacked authority to correct its order dismissing the petition with prejudice. The Department concedes the absence of jurisdiction. The concession is well taken.

Since the issue of the authority of the court to act presents pure issues of law, we exercise de novo review. (*Conservatorship of Kane* (2006) 137 Cal.App.4th 400, 405.)

An order dismissing a dependency petition with prejudice is a final order for purposes of the right to appeal and the doctrine of res judicata. (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 196-197 [order made by a juvenile court judge].) The dependency court referee's order dated May 7, 2008, dismissing the petition with prejudice was final as far as the referee was concerned, subject to a petition for rehearing before a

dependency court judge within ten days under sections 250[4] and 252.[5] No rehearing petition was filed in this case.

A court does have inherent authority to reconsider its previous interim orders on its own motion. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108 ["If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief."].) The dependency court referee's order of dismissal was not an interim order. It was a final order, which could have been challenged either by a petition for rehearing under section 252 or by the timely filing of a notice of appeal under *In re Sheila B.*, *supra*, 19 Cal.App.4th at pages 196-197.

A dependency court has broad discretion to modify an order pertaining to a "person subject to its jurisdiction" under section 385.[6] (*In re S.B.* (2004) 32 Cal.4th 1287, 1297; *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 98-99.) Once the dependency court referee ordered the petition dismissed with prejudice, V. and Maria were not at that point persons subject to the jurisdiction of the dependency court. To the contrary, the plain meaning of the referee's order was that dependency court jurisdiction

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4 Section 250 provides: "Except as provided in Section 251, all orders of a referee other than those specified in Section 249 shall become immediately effective, subject also to the right of review as hereinafter provided, and shall continue in full force and effect until vacated or modified upon rehearing by order of the judge of the juvenile court. In a case in which an order of a referee becomes effective without approval of a judge of the juvenile court, it becomes final on the expiration of the time allowed by Section 252 for application for rehearing, if application therefor is not made within such time and if the judge of the juvenile court has not within such time ordered a rehearing pursuant to Section 253."

5 The time allowed by section 252 to apply for a rehearing expires 10 days after service of a written copy of the findings and orders of the referee.

6 Section 385 provides as follows: "Any order made by the court in the case of any person subject to its jurisdiction may at any time be changed, modified, or set aside, as the judge deems meet and proper, subject to such procedural requirements as are imposed by this article."

did not exist. Section 385 does not provide authority for the referee's decision to vacate the order dismissing the petition with prejudice.

At the time of the renewed adjudication hearing on May 23, 2008, Maria indicated she had separated from Carlos and, as a consequence, V. was no longer living with him. Unless circumstances have changed, reversal of the judgment as to Maria therefore will not result in V. being placed in the position of residing with the man who molested her. We express no opinion as to whether a new dependency petition would be proper, if Maria and Carlos reconcile and again cohabit, on the basis that V. has been placed in risk of harm from sexual abuse.

DISPOSITION

The orders in T.'s case, juvenile court No. CK71612, are affirmed. The judgment in V.'s case, juvenile court No. CK71611, is reversed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.